UNITED NATIONS

AT

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 607

Case No. 656: THOLLON

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Samar Sen, Vice-President, presiding; Mr. Mikuin Leliel Balanda; Mr. Hubert Thierry;

Whereas at the request of Jean Thollon, a staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, extended to 31 December 1991 and 28 February 1992 the time-limit for the filing of an application to the Tribunal;

Whereas, on 28 February 1992, the Applicant filed an application containing the following principal pleas:

> "5. [To] rescind the decision of the Secretary-General to reject the unanimous recommendation of the Joint Appeals Board contained in its report No. 839 of 2 July 1991, paragraph 17, ...
>
> 6. [To] order the implementation of the Joint Appeals Board's unanimous recommendation contained in paragraph 17 of its report and consequently, the transfer of Applicant to the first available P-4 post in Geneva, ...
>
> 7. [To] order the Respondent to pay the Applicant the sum equivalent to two years base salary as compensation for the Secretary-General's decision not to implement the report of the Panel on Discrimination [dated] 12 May 1983 ...
>
> 8. Alternatively, in lieu of specific performance regarding his transfer to Geneva, [to] order the Secretary-General to pay instead the Applicant, as compensation, the sum equivalent to three years net base salary."

Whereas the Respondent filed his answer on 29 April 1992;

Whereas the Applicant filed written observations on 11 August 1992;

Whereas, on 20 May 1993, the Applicant submitted additional documents, to which the Respondent filed comments on 2 June 1993;

Whereas the Applicant filed an additional document on 11 June 1992;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 16 October 1974, as an Associate Public Administration Officer in the Department of Economic and Social Affairs. He was initially offered a two-year fixed-term appointment at the P-2, step VIII level that was successively extended for further fixed-term periods, to 15 October 1976, 15 October 1978 and, finally, to 15 October 1981. On 1 October 1981, his appointment became probationary, and on 1 July 1982, permanent. On 1 April 1977, the Applicant was promoted to the P-3 level as a Public Administration Officer, and on 1 April 1983, to the P-4 level.

During 1983, the Applicant, on account of difficulties with his supervisor, the Chief of the Fiscal and Financial Branch, filed a complaint with the Panel on Discrimination and Other Grievances (the Panel on Discrimination). In a letter dated 12 May 1983 from the Coordinator of the Panel on Discrimination to the then Under-Secretary-General, Department of International Economic and Social Affairs, the Coordinator expressed satisfaction at the fact that the Under-Secretary-General had met with a member of the Panel and had agreed that he would be taking steps to provide [the Applicant] with a suitable transfer within [his] office". The Applicant, however, was not transferred from his post. In March 1985, the Assistant Secretary-General for Development Research and Policy Analysis, Department of International Economic and Social Affairs, assigned the Applicant to work in his office, an arrangement which lasted

until December 1987, when the Chief of the Fiscal and Financial Branch retired. The Applicant then resumed his former functions.

In May 1987 the Applicant's father died. On 7 October 1987, the Applicant wrote to the Assistant Secretary-General, Office of Human Resources Management, expressing the wish, as an only child, to be transferred to Geneva in order to be closer to his mother, who lived in Grenoble and was almost blind. The Applicant was then advised, on 9 October 1987, to apply "for appropriate positions under the Vacancy Management and Staff Redeployment Programme". The Applicant applied for several posts in Geneva, but was not selected.

On 28 February 1990, the Applicant requested the Secretary-General to review the decision not to transfer him, in particular, to Geneva, despite his having applied for about one dozen posts (some located in Geneva), and despite the 1983 recommendation of the Panel on Discrimination, apparently accepted by the former head of his department, that he should be transferred to another post within that department.

On 3 April 1990, the Chief of the Administrative Review Unit sent a communication to the Applicant, which read, in part, as follows:

> "While I sympathize with your wish to find a position that would enable you to be closer to your mother, who is aged and infirm, I regret that your request does not appear to comply with the provisions of staff rule 111.2(a). The Grievance Panel recommendation was nearly seven years ago, and there is no indication of deliberate non-compliance on the part of DIESA [Department of International Economic and Social Affairs]. To be placed on a short list for a post is not included in your terms of appointment. Under the Vacancy Management system, it is your responsibility to apply for any suitable vacant post, and I would urge you to do so, and to seek the assistance of the Recruitment and Placement Division in finding a suitable vacancy."

On 17 May 1990, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The Board adopted its report on 2 July 1991. Its conclusions and recommendations read as follows:

"Conclusions and Recommendations

15. Although the Panel has only been seized with the present appeal, it felt it would be irresponsible if it did not bring to the attention of the Administration the fact that, not only Appellant, but the Fiscal and Financial Branch as a whole has suffered from administrative neglect.

16. The Panel, having taken into consideration the admitted quality of Appellant's work, the fact that - while still in the Fiscal and Financial Branch - he was not assigned work in his area of expertise, and his seniority in grade, concludes that Appellant has not received fair and just treatment and that his career has suffered as a consequence.

17. The Panel recommends that, in view of Appellant's family circumstances and consistent with the authority of the Secretary-General under staff regulation 1.2, Appellant be transferred at the earliest possible moment to a suitable post in Geneva, one in which he will have reasonable career development opportunities. Should such a post in Geneva not become available within ninety days, Appellant should be offered a post at Headquarters with adequate career development opportunities, as the Panel is convinced that Appellant should in any event be transferred without further delay.

18. The Panel makes no further recommendation with respect to this appeal."

On 22 July 1991, the Officer-in-Charge of the Department of Administration and Management wrote to the Applicant, advising him as follows:

"The Secretary-General has re-examined your case in the light of the Board's report. He has serious reservations with regard to the Board's conclusions concerning the receivability of the appeal and, bearing in mind the following considerations:

(a) that a staff member has no right to any particular assignment or function;

(b) that movement of staff to posts at the same or a higher level is subject to established procedures and, while staff members have a right to be considered under such procedures for posts for which they are qualified, they have no right to reassignment to another post; and

(c) that a staff member has a right to be assigned tasks commensurate with his/her level and qualifications;

the Secretary-General has decided that, in lieu of the actions recommended by the Board:

(a) your department review your assignments/functions and take the necessary measures to ensure, that either in your present post or in another post in the department, you are given, on a full-time basis, assignments/functions which are commensurate with your grade level and qualifications, and,

(b) at the same time, special efforts be made to ensure that you are given full and fair consideration for posts outside your department for which you are qualified and for which you apply."

On 28 February 1992, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The rejection by the Secretary-General of the unanimous report of the JAB violates his commitment to implement unanimous recommendations of the Board.

2. The recommendation contained in paragraph 17 of the unanimous JAB report does not constitute a violation of any major question of law or principle and should have been implemented.

3. The Administration violated the Applicant's rights by ignoring the report of the Panel on Discrimination on his case.

Whereas the Respondent's principal contentions are:

1. Assignment of staff is at the discretion of the Secretary-General. The Applicant has not discharged the burden of proof to establish that his non-selection for posts for which he had applied was improperly motivated.

2. The Secretary-General is not bound to accept unanimous recommendations of the JAB.

The Tribunal, having deliberated from 11 to 30 June 1993, now pronounces the following judgement:

I. The Applicant, a French national, entered the service of the United Nations in October 1974; he performed various functions, and was promoted to the P-4 level in April 1983.

The Applicant requested, unsuccessfully, to be transferred to Geneva, in order to be as near as possible to his aged and infirm mother, who lived in Grenoble. Because of the Administration's inaction, he lodged an appeal with the Joint Appeals Board (JAB), whose recommendations were endorsed by the Administration. The JAB had recommended that the Applicant be transferred "at the earliest possible moment to a suitable post in Geneva, one in which he will have reasonable career development opportunities" or, alternatively, that he be offered an equivalent post at United Nations Headquarters.

II. As this recommendation was not implemented, despite having been accepted by the Secretary-General, the Applicant, believing that he had been a victim of discrimination, filed an appeal with the Tribunal. The Applicant requests the Tribunal to order the implementation of the JAB's recommendation. Alternatively, the Applicant requests, as compensation, a sum equivalent to three years' net base salary.

III. The Respondent asks the Tribunal to reject the application, arguing that the Administration has exercised its discretionary powers, and that the Applicant has not discharged the burden of proving that the failure to select him for the various posts for which he has applied was motivated by extraneous factors. Lastly, the Respondent maintains that the Administration is not bound to accept unanimous recommendations of the JAB.

IV. The Tribunal, in accordance with its jurisprudence, reaffirms that the Secretary-General has discretionary powers to appoint

officials to certain posts or to reject such appointments, so long as his decision is not tainted by improper motives and he has acted in the interests of the service (cf. Judgements No. 573, Bhatia (1992), para. VII, and No. 574, Megzari (1992)). The Tribunal further notes that a staff member has no right to any particular post within the Administration, and that the selection of candidates depends on both their personal merits and their qualifications. (Cf. Judgement No. 574, Megzari, para. III.) On the other hand, the Tribunal notes that all staff members have a right to be employed in a manner commensurate with their qualifications and skills. (Cf. Judgement No. 544, Lukas (1991)).

V. The Tribunal further notes, in accordance with its jurisprudence, that while a unanimous recommendation of the JAB carries special weight because of such unanimity, it constitutes no more than advice, and does not create an obligation which the Respondent must comply (cf. Judgements No. 377, Jabri (1986), para. XI, and No. 562, Al-Jaff (1992)).

VI. In the case under review, the Tribunal notes that, as the JAB and the Administration have acknowledged, the Applicant has never been properly employed. Furthermore, the Tribunal considers that the authorities responsible for carrying out the Secretary-General's instructions have not made the requisite efforts to transfer the Applicant to a post commensurate with his abilities. The Tribunal concludes that the Applicant has thus suffered an injury which must be compensated. The Tribunal further notes that, from 1982 to 1987, the Applicant's performance has not been evaluated in accordance with the provisions of staff rule 112.6. The Tribunal considers that the failure to evaluate the Applicant's performance may have influenced the fact that he remained at the same level for so long. Accordingly, the Tribunal holds that compensation is also called for on this account.

VII. For the foregoing reasons, the Tribunal:

1. Decides that the Applicant shall be awarded a lump sum of US$5,000 for the various injuries suffered.

2. Decides that, in the interests of the service, the Respondent shall, on compassionate grounds, make every effort to transfer the Applicant to a post commensurate with his qualifications, preferably in Geneva.

3. Rejects all other pleas.

(Signatures)

Samar SEN
Vice-President, presiding

Mikuin Leliel BALANDA
Member

Hubert THIERRY
Member

Geneva, 30 June 1993

R. Maria VICIEN-MILBURN
Executive Secretary